

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEBAMOFF ENTERPRISES, INC,
JOSEPH DOUST
JACK STRIDE
JACK SCHULTZ
and
RICHARD DONOVAN,

No. 2:17-cv-10191

HON. ARTHUR J. TARNOW

Plaintiffs,

v

RICK SNYDER, Governor of
Michigan,
WILLIAM SCHUETTE, Attorney
General of Michigan,
AND ANDREW J. DELONEY,
Chairperson of the Michigan Liquor
Control Commission,

Defendants,

and

MICHIGAN BEER & WINE
WHOLESALE ASSOCIATION,

Intervenor.

AFFIDAVIT OF PAMELA S. ERICKSON

Now comes Pamela S. Erickson who declares and states on her oath
as follows:

1. The information in this affidavit is based on my personal knowledge and expertise in alcohol regulation and research involving alcohol policy, except where stated that its based upon information and belief. I am fully competent to testify regarding these matters if called upon to do so.

2. I have a B.A. in political science from Portland State University and a M.A. in Government from Georgetown University in Washington, D.C.

3. I currently own a small business based in Henderson, Nevada. That business, Public Action Management, LLC, involves consulting on alcohol policy issues and providing an educational program called the “Campaign for a Healthy Alcohol Marketplace.” I began that campaign in 2008 and, since that time, have produced a monthly newsletter and numerous reports and have served as a legal expert. From 2003 until 2007, I managed statewide media education and leadership advocacy programs designed to reduce underage drinking for Oregon Partnership, a non-profit entity dedicated to alcohol and drug abuse prevention. From 1996 to 2003, I was the Executive Director of the Oregon Liquor Control Commission. In that

capacity, I was responsible for administering and enforcing all statutes of the Liquor Control Act, licensing approximately 10,000 businesses, and managing the state's distilled spirits business, which included 240 retail outlets and a wholesale operation. I also have extensive experience in regulation and legal processes dealing with unemployment insurance and taxation, wage and hour laws, and licensing of various professions. For two years, I served on the faculty of the National Judicial College for a course on "Administrative Law, High Volume Proceedings."

4. I have developed a national education campaign to help policy makers understand alcohol regulation. This campaign includes a monthly newsletter and a website featuring extensive educational materials: healthyalcoholmarket.com. I have also produced and published several reports: "The Danger of Alcohol Deregulation, the United Kingdom Experience," "The High Cost of Cheap Alcohol," "Safe and Sound, How the Three-Tier System of U.S. Alcohol Regulations Helps Ensure Safe Products and Protects Against Revenue Loss," and an annual report, "2017 Issue Briefs for States."

5. I have made frequent presentations at national, regional,

and state conferences on regulation topics and have served as an expert witness in alcohol regulatory cases in Kentucky, Illinois, Georgia, and California. My curriculum vitae is attached to this affidavit.

6. A key issue in this lawsuit is whether States have the authority to require alcoholic beverages to generally enter the state through its three-tier system. Plaintiffs object to a Michigan law that allows in-state alcohol retailers to sell, ship, and deliver alcoholic beverages directly to Michigan consumers but prohibits out-of-state retailers from doing the same. Plaintiffs contend that the law deprives them of their constitutional right to engage in such business, citing the Interstate Commerce Clause and the Privileges and Immunities Clause of the 14th Amendment, as well as the Supreme Court's decision in *Granholm v. Heald*. This contention stands in juxtaposition to the U.S. Constitution's 21st Amendment, which prohibits the transportation or importation of alcohol into a state in violation of that state's laws. The Supreme Court in *Heald* recognized that a state-based regulatory system such as the three-tier system for alcohol distribution is "unquestionably legitimate." The three-tier system provides for an orderly marketplace that balances the state's significant interest in

protecting the health, safety, and welfare of its citizens from alcohol-related dangers and the interests of citizens in obtaining desired products.

7. A major consideration involved in any alcohol regulatory issue is the fact that alcohol has the potential to create great social harm. According to the Centers for Disease Control and Prevention,¹

Excessive alcohol use is responsible for 88,000 deaths in the United States each year. It also accounts for 1 of 10 deaths among work-age adults and shortens the lives of those who die by an average of 30 years. In 2010, excessive alcohol use cost the US economy \$249 billion, or \$2.05 a drink. In addition, \$2 of every \$5 of these costs were paid by the public.

8. The public is aware of the problems alcohol causes, given that many members of the public have been harmed in some way by alcohol use. The Gallup organization has asked the following question in its polling since 1947: “Has drinking ever been a cause of trouble in your family?” In response to its July 13, 2017 poll, 33% said “yes.”² Regulation is warranted to curtail the harm alcohol causes and the

¹ At a Glance 2016 Excessive Alcohol Use, <https://www.cdc.gov/chronicdisease/resources/publications/aag/pdf/2015/alcohol-aag.pdf>.

² See Alcohol and Drinking, http://news.gallup.com/poll/1582/Alcohol-Drinking.aspx?g_source=ALCOHOL&g_medium=topic&g_campaign=til eswww.Gallup.

threat to public health and safety it presents.

In order to reduce harm from alcohol, certain traditional marketing strategies frequently applied to non-alcoholic products need to be limited. For example, a seller of non-alcoholic products will typically want to identify customers that buy the most of the seller's products, employ strategies to enlarge that group, and encourage them to increase their purchases. But when the product for sale is alcohol, problems arise because a customer base of "frequent buyers" includes those who are addicted to or abuse alcohol. Often, products are marketed through coupons, price reductions, and other techniques such as volume discounts to achieve increased sales. Michigan's liquor laws limit these practices by setting a minimum price for spirits, M.C.L. § 436.1229; by restricting manufacturers and wholesalers from selling beer or wine at a quantity discount, M.C.L. § 436.1609a(5), Mich. Admin. Code, R. 436.1726(4); and by restricting retailers from selling any alcohol at a loss, Mich. Admin. Code, R. 436.1055. Sellers of non-alcoholic products also frequently market to young people to build a solid future customer base. But marketing alcohol to young people would encourage underage drinking.

Permitting deliveries by out-of-state retailers could frustrate these attempts to curtail harm caused by alcohol. The restrictions on alcohol discounts and sales for a loss would not necessarily apply to out-of-state retailers. Moreover, out-of-state retailers delivering alcohol outside of their own state have less incentive to not sell to minors. For instance, in this case, Lebamoff Enterprises has admitted that it would not use the same stringent training to avoid sales of alcohol to minors for out-of-state sales that it uses for sales within Indiana. *Doust Dep.* 41.

9. Today's alcohol regulatory system is designed to prevent the extreme social problems and harm experienced before Prohibition where local markets were monopolized by large national manufacturers. Before Prohibition, alcohol was sold almost exclusively in bars, then called "saloons." These were primarily owned by large national manufacturers. These manufacturers, motivated by extracting the highest possible profit, pushed the retailer "saloons" to aggressively sell the product, which in turn, created major social problems with public intoxication, violence, addiction, and family ruination. Problems were so severe that the drastic step of Prohibition was taken, eliminating the legitimate alcohol marketplace. After Prohibition, the alcohol market

had to be reestablished. Because states were given the responsibility to regulate alcohol, each state had to design a new regulatory system. With little expertise in such matters, most states relied on the recommendations of a study financed by John D. Rockefeller, a prominent entrepreneur of the day. The study, *Toward Liquor Control*, was written by R.B. Fosdick and A.L. Scott. This work contains an extensive discussion of the problems created by the “saloon system,” the lessons from Prohibition, the recommendations of over 400 leaders interviewed for the study, and reviews of regulatory systems around the world.

10. A major issue identified in the study was the problem of an “absentee owner” that was characteristic of the “Tied House.” The Tied House was a vertically integrated system in which large, national alcohol manufacturers owned most of the retail outlets in most local communities throughout the United States. This meant that the local retailers were controlled by an absentee owner who was primarily interested in extracting profits by whatever means possible. In *Toward Liquor Control*, the authors described the problem:

The “tied house” system had all the vices of absentee ownership. The manufacturer knew nothing and cared nothing about the

community. All he wanted was increased sales. He saw none of the abuses, and as a non-resident he was beyond local social influence. [*Toward Liquor Control*, Raymond Fosdick and Albert L. Scott, The Center for Alcohol Policy, 2011, p. 29.]

The problems of the Tied House provide the rationale for many of today's regulations. Those involved in recommending regulatory measures were adamant that the "tied house" should never return. Fosdick and Scott warned, "The 'tied house,' and every device calculated to place the retail establishment under obligation to a particular distiller or brewer, should be prevented by all available means." *Toward Liquor Control*, p. 29. As a result, most states have a three-tier structure that prevents vertical integration by requiring separate licensure of businesses in the manufacturing, wholesaling, and retailing tiers and by prohibiting ownership and favorable financial arrangements between tiers. There was a recognition that manufacturing would likely be nationally-based, and manufacturers are required to be federally licensed. Wholesale and retail licenses and regulation are left primarily to the states. Allowing out-of-state retailers to sell and ship alcohol into another state creates a variation of the absentee owner problem. Not only is the out-of-state retailer "beyond local social influence," but he or she would be beyond most

state and local regulation.

11. After Prohibition, many states adopted laws requiring a physical presence or residency in the state as a condition of licensure. These laws are not “protectionist”; rather they are designed to avoid the problems of the “absentee owner” noted earlier. Thus, the laws were more about protecting local businesses and their communities from the aggressive sales tactics and other abuses experienced before Prohibition than about economic protectionism prohibited under the Commerce Clause. The protection was more “against” the power and tactics of large out-of-state businesses than “for” the economic benefit of local enterprises.

12. Since Prohibition, states have worked to adapt to new conditions while continuing to balance the need to protect the public and accommodate business needs. A lesson from Prohibition was the need to change with the times and in accordance with public sentiment. Over the years, regulatory systems have changed to accommodate electronic finance and web-based services and have allowed greater access to the sale of alcohol, while developing strong enforcement mechanisms to reduce underage drinking and drunk driving.

13. In the case of direct delivery to customers, change has been limited due to the risks involved. According to the National Conference of State Legislatures' website, most states permit direct shipment of limited quantities of wine from out-of-state wineries to in-state consumers. However, shipments of spirits or beer from out-of-state producers is much more restricted—only 5 states allow direct shipment of spirits and only 8 allow direct shipment of beer from out of state.³ Furthermore, many states restrict the amount of alcohol that can be directly shipped and require licenses/permits, special package labelling, and a signature upon delivery to ensure the package does not go to an underage person. A minority of states allow direct shipment from out-of-state retailers either through a permit or an agreement between states to allow retailers to ship alcohol to each state within the agreement.

14. Recent tests of compliance have revealed substantial violations. In 2015, the Illinois Liquor Control Commission issued over 100 cease-and-desist letters to retailers, wineries, and fulfillment

³ National Conference of State Legislators, <http://www.ncsl.org/research/financialservices-and-commerce/direct-shipment-of-alcohol-state-statutes.aspx>.

houses stating that it had evidence of the recipient's non-compliance with licensing and shipping laws.⁴ Since 2016, the Michigan Liquor Control Commission (MLCC) has conducted extensive enforcement sting operations and found substantial non-compliance by unlicensed and licensed out-of-state wineries. Based on reports from these controlled-buy operations, the Michigan Department of Attorney General has sent 225 cease-and-desist letters to wineries, most of which had ignored Michigan law banning the shipments without a license. See affidavit of Mary Anne Donley. Since 2016, the MLCC has generated 198 violation reports and has issued 175 violation warning notices to licensed direct shippers for a variety of violations of Michigan's liquor laws (e.g. incorrect labeling and packaging). *Id.* The MLCC has found that alcohol deliveries from out of state are too often left at the doorsteps of consumers and delivered to any occupant of the house without age verification. Based on my experiences and the MLCC's controlled-buy operations, out-of-state and unlicensed

⁴ "Illinois sends over 100 cease and desist letters," by Jeff Carroll, VP of Compliance, ShipCompliant, February 2, 2015, <https://www.shipcompliant.com/blog/2015/02/02/illinois-sends-100-cease-desist-letters/>.

deliveries are being made directly to underage persons.

15. The Michigan Beer and Wine Wholesalers Association funded a 2015 study by The Hill Group involving a series of 26 controlled interstate shipment buys. The study found an extremely low level of compliance. For example, only 1 of 15 unlicensed sellers refused to ship wine to a Michigan consumer; none of the deliveries had the appropriate labeling on the delivered package; and individuals under the age of 21 were able to order, purchase, and receive shipments of alcohol.⁵

16. A similar study conducted by Rebecca Williams and Kurt Ribisl of the University of North Carolina concluded that “[a]ge verification procedures used by Internet alcohol vendors do not adequately prevent online sales to minors.”⁶ In their study of direct-shipment compliance, the University of North Carolina researchers first attempted to identify the universe of Internet Alcohol Vendors (IAVs),

⁵ “Wine Direct Shipping Research and Analysis,” November 2015, A report prepared for the Michigan Beer & Wine Wholesalers Association by The Hill Group, Inc., a management consulting firm based in Carnegie, Pennsylvania.

⁶ “Internet Alcohol Sales to Minors,” by Rebecca S. Williams and Kurt M. Ribisl, September 2012, *Arch Pediatr Adolesc Med*. 2012;166(9):808813. doi:10.1001/archpediatrics.2012.265.

but they found so many of them that they had to stop counting at the first 5,000. I know of no database of enforcement practices for laws relating to IAVs, but it seems likely that little enforcement takes place.

17. Michigan regulators have had the same trouble with out-of-state wineries delivering directly to minors. In 2015, minors working with the direct-shipper enforcement team attempted 24 purchases from licensed direct shippers and were successful on 8 of those purchases. See affidavit of Mary Anne Donley. Four of the 8 successful minor purchases were from out-of-state direct shippers. *Id.* In 2017, minors working with the MLCC's direct-shipper enforcement team attempted 53 purchases from out-of-state direct shippers and were successful on 19 purchases. *Id.* None of the three Michigan direct shippers allowed the minor decoys to purchase wine. *Id.* In all of the successful purchases, the wine was delivered to the minor working with the direct-shipper enforcement team.

18. Based upon information and belief, there are 388,000 alcohol retailers in the United States.⁷ Given the enormous universe of retailers

⁷ <https://www.census.gov/data/tables/2015/econ/susb/2015-susb-annual.html>.

that exist in the U.S., if Michigan permits out-of-state retailers to become licensed and to directly ship all alcoholic beverages to consumers in the state, effective enforcement over such a volume of licensees would be unworkable, if not impossible.

19. In Michigan, there are approximately 16,444 off-premises licensed retailers of beer, wine, and spirits. See Affidavit of Julie Wendt. It would be unworkable for the MLCC to expend the same amount of resources investigating potentially hundreds of thousands of out-of-state retailers as it expends investigating the approximately 16,444 off-premises licensed retailers of beer, wine, and spirits located in Michigan. *Id.* In-state retail licensees are subject to a rigorous background investigation to ensure they are responsible, law abiding citizens. The premises are inspected thoroughly before the initial license is issued and periodically thereafter for violations. A liquor inspector usually has the right to enter and inspect a licensed premises at any time. Moreover, the MLCC can rely on Michigan's local law enforcement agencies to assist in inspections and investigations into violations of state liquor laws. But licensing an out-of-state entity cannot realistically involve the same level of inspection and consistent

investigation. First, a state's regulators cannot rely on out-of-state law enforcement officials to conduct inspections or "stings" to enforce that state's liquor laws. Likewise, based on information and belief, most out-of-state regulatory agencies will not take action to enforce another state's liquor laws. Second, no state regulatory agency has the budget to inspect potentially hundreds of thousands of out-of-state retailers in the same rigorous manner as the agency can inspect a significantly smaller number of in-state retailers. Third, a state regulatory agency has few enforcement tools to use against an out-of-state violator. A state can issue a fine but may not have the resources to collect it. A state could take away a license. But, as some states have discovered, some retailers are willing to defy the law and just continue to ship illegally. Taking effective action may require the services of the state's Attorney General's office, and it may be difficult to convince a state's Attorney General to spend scarce resources on such matters.

20. Direct delivery to consumers, particularly from out-of-state retailers operating outside the three-tier system, increases the risk of unsafe or fraudulent products and revenue loss. Michigan, like most states, requires the wholesaler to collect the state excise tax on alcohol,

and the retailer collects the sales tax. Not only does this save the state collection costs, but the system in general results in few compliance problems, based on a study conducted by KPMG LLP.⁸ The study's authors noted, "State administrators indicate that relatively few issues arise in administration of gallonage taxes."⁹ They also concluded that "[o]ther features of the regulatory system governing the sale of beer, including the three-tier system of distribution, exclusive territories for beer wholesaling and various controls on the retailing of beer, contribute significantly to the administration of all types of taxes on beer"; and, "to the extent that beer could be sold into the state outside the three-tier system, the potential for evasion would increase and the government resources required to ensure compliance would be greater."¹⁰ Since out-of-state retailers would not purchase their alcohol from Michigan wholesalers, Michigan would have to rely on those retailers to accurately report and pay the excise tax. Likewise, out-of-

⁸ "An Analysis of the Structure and Administration of State and Local Taxes Imposed on the Distribution and Sale of Beer," Prepared for the National Beer Wholesalers Association, by Washington National Tax, KPMG LLP, Washington, DC, March 2009.

⁹ *Id.* at p iv.

¹⁰ *Id.* at pp v-vi.

state retailers may, but are not required to, collect Michigan use tax for purchases made over the internet. If an out-of-state retailer does not collect Michigan sales tax, the purchaser is required to voluntarily declare the purchases on his or her Michigan income tax form and pay the 6% Michigan use tax on those purchases. Based on information and belief, many taxpayers decline to report those purchases, and it is unworkable for state regulatory agencies to track and enforce use taxes owed. Other countries—without a three-tiered system—experience substantial losses of revenue. For example, the United Kingdom’s Revenue and Customs department estimates it loses over \$1.6 billion annually.¹¹ In fact, the UK recently adopted a wholesaler registration system as a way to stop tax losses.¹²

21. Moreover, countries without the three-tier system’s safeguards have periodic problems with unsafe products.¹³ In a report

¹¹ “MP’s demand action on lost alcohol taxation,” by Simon Compertz, BBC News, August 29, 2012, <http://www.bbc.com/news/business-19399037>.

¹² <https://www.gov.uk/guidance/the-alcohol-wholesaler-registration-scheme-awrs>

¹³ Tobiassen, The “Fake Alcohol” Situation in the United States: The Impact of Culture, Market Economics, and the Current Regulatory System, available at http://www.centerforalcoholpolicy.org/wp-content/uploads/2015/04/The_Fake_Alcohol_Situation_in_the_United-

on “fake alcohol,” Robert Tobiassen noted, “Serious public health risks, including incidents of death, from consumption of fake alcohol have been reported in the news media from many countries such as China, Cuba, Czech Republic, Ecuador, India, Indonesia, Iran, Kenya, Libya, Pakistan, Russia Federation (Russia), South Africa, Turkey, Uganda, and the United Kingdom of Great Britain and Northern Ireland (United Kingdom or UK), among other countries.” In Michigan’s system, the wholesaler tracks all products and quickly effectuates recalls when needed. The result is a very safe system. But if out-of-state retailers are permitted to sell wines or other alcoholic beverages that they did not purchase from Michigan wholesalers, the product-safety function a wholesaler provides is lost. The Commission could not help effectuate a recall of a product if it does not know the product has been shipped or delivered into this state. Recently, Mexico experienced a rash of tainted alcohol products sold in tourist areas that killed at least one U.S. citizen and injured others.¹⁴ Authorities seized a large amount of

[States compressed.pdf](#) (accessed December 5, 2017).

¹⁴ Raquel Rutledge, *As Dozens More Report Blackouts at Mexico Resorts, Country Says it will Act on Tainted Alcohol*, Milwaukee Journal Sentinel, July 28, 2017, available at <https://www.jsonline.com/story/news/investigations/2017/07/28/amid->

alcohol product from popular resort areas and the U.S. State Department issued a warning to citizens. There are literally thousands of alcohol products offered over the internet, and there is little ability to determine the authenticity or safety of the product.

22. Customers have the ability to obtain products from out-of-state without the state having to permit a system that presents substantial enforcement risks. Many retailers have “special order” processes, so a customer can obtain a product not normally stocked. Products from out of state can enter the three-tier system and be sold through a local retailer. Moreover, Michigan citizens can personally transport not more than 312 ounces of alcoholic liquor that contains less than 21% alcohol by volume into Michigan for personal use in each 24-hour period. Affidavit of Wendt. Michigan citizens can also import more than 312 ounces of alcoholic liquor that contains less than 21% alcohol by volume if prior Commission approval has been obtained. The Commission approves approximately 100 such requests per year. See Affidavit of Julie Wendt

[more-blackout-reports-mexico-says-take-action-tainted-alcohol-resorts/519101001/](#) (accessed December 11, 2017).

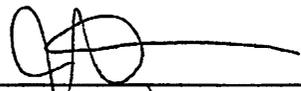
Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury
that the foregoing is true and correct.

Dated this 6th day of March 2018.



Pamela S. Erickson

Subscribed and sworn to before me
this 6 day of March 2018.



Jennifer Herman, Notary Public
Clark County, Nevada
Acting in Clark County, Nevada
My Commission expires: NOV. 13, 2018

